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The Stealth Assault on Antitrust Enforcement: Raising the Barriers for Antitrust Injury and Standing

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The first Annual Conference[1] sponsored by the American Antitrust Institute featured a number of prominent speakers[2] and explored a number of important issues.[3] The Conference had two principal focuses: substantive questions of antitrust liability and the future direction of public enforcement of the antitrust laws by the Department of Justice's Antitrust Division and by the Federal Trade Commission. However, an issue of at least equal importance was barely discussed, although it has seriously affected the scope and direction of the antitrust laws. That issue: Private enforcement of the antitrust laws, and the significant undermining of those efforts by a number of restrictive recent decisions from the Supreme Court and lower courts.

From the very inception of the Sherman Act in 1890, the statutory scheme of the antitrust laws has relied on enforcement by the government[4] and private parties.[5] Indeed, private plaintiffs are sometimes referred to as "private

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1. An Agenda for Antitrust in the 21st Century, Washington, D.C., June 15, 2000.

2. Among the speakers were former Senator Howard Metzenbaum (D.-Ohio), Attorney General Janet Reno, Federal Trade Commission Chairman Robert Pitofsky, and Assistant Attorney General Joel Klein.

3. Topics included "The Challenge of High Technology," "A New Framework for Collusion," "Consumer Choice as a Focal Point of Antitrust Analysis," "The Politics of Antitrust" and "Toward a Post-Chicago Antitrust for the 21st Century."

4. Originally, responsibility for governmental enforcement of the antitrust laws was undertaken solely by the Department of Justice. Since 1914, that responsibility has been shared with the Federal Trade Commission, which may challenge alleged violations both of the antitrust laws and of "[u]nfair methods of competition," which are prohibited by Section 5 of the F.T.C. Act. 15 U.S.C. § 45 (1994 & Supp. 1998).

5. Section 7 of the Sherman Act contained a treble damage provision similar to that found in Section 4 of the Clayton Act. Sherman Antitrust Act, ch. 647, 26 Stat. 210 (1890); Clayton Antitrust Act, ch. 323, 38 Stat. 730 (1914) (current version at 15 U.S.C. § 18 (1994 & Supp. 1998)). The Sherman Act provision was ultimately repealed by the Act of July 7, 1955, ch. 283, § 3, 69 Stat. 283. *See generally* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 486 n.10 (1977) (discussing congressional intent of the Clayton Act's extension of the remedy available); EARL W. KINTNER, 1 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 52 (1978) (reprinting the original text of the Sherman Antitrust Act of 1890).

attorneys general."[6] So important is private enforcement that the statute contains several incentives for private litigants to sue, such as automatic trebling of damages, plus the award of attorney's fees and costs to the successful plaintiff from the defendant found to have violated the antitrust laws.

There are numerous reasons to encourage private enforcement. Governmental resources are inherently limited, and those scarce resources can be devoted to other tasks if private parties also police unlawful conduct. Private parties are usually mostly directly affected by that conduct, and so they are likely to learn more quickly about the violation. Sound public policy dictates that those parties who have been harmed by antitrust violations, such as those forced to pay higher prices because of a price-fixing conspiracy, or forced out of a market because of exclusionary or predatory behavior, should obtain compensation therefor. Finally, the prospect of treble damage lawsuits by the defendant's prospective victims will act as a deterrence to the unlawful conduct.

The value and changing role of private enforcement are also reflected statistically. Over the past twenty-five years, private filings have accounted for the overwhelming majority of all antitrust complaints brought in the federal courts.[7] However, despite the clear value of enforcement of the antitrust laws by private litigants, the jurisprudence of the past two decades has erected ever-higher hurdles to private actions. The effect of this caselaw is reflected by two other statistics: the percentage of filings represented by private cases, while still high, has been shrinking,[8] and the absolute number of private filings has dropped precipitously.[9]

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6. *See, e.g.*, Rotella v. Wood, 528 U.S. 549, 557 (2000); Klehr v. A.O. Smith Corp., 521 U.S. 179, 199 n.2 (1997) (Scalia, J., concurring).

7. In the period from fiscal years 1975 to 1999, the percentage of antitrust cases accounted for by private filings ranged from a high of 95.6% in 1976 to a low of 83.4% in 1990. Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics—1999, at 448 tbl. 5.46 (2000), *available at* http://www.albany.edu/sourcebook/1995/pdf/t546.pdf. The percentage for the year ending September 30, 1999, was 88.9%. *Id.*

8. In every fiscal year from 1975 to 1986, the percentage of private filings was over 90%, and in the first six of those years it was always over 93%. *Id.* From 1987 to 1999, it ranged from a low of 83.4% to a high of 90.8%, and has been over 90% for only four of those years. *Id.*

9. In absolute numbers, the total private filings exceeded 1,000 for each fiscal year between 1975 and 1985, reaching a high of 1,611 in 1977. *Id.* Since then, the numbers have dropped significantly, to a low of 452 private filings in 1990. *Id.* More recently, there were 548 private filings in 1998 and 608 such filings in 1999. *Id.* However, for the most recent fiscal year, private filings rose sharply, to 811. Judicial Business of the United States Courts 2000 Table C-2, *available at* http://www.uscourts.gov/judbus2000/contents.html. This was fueled in large part by a dramatic rise in the number of antitrust class actions, from 100 in fiscal year 1999 to 213 in the present fiscal year. *Id.* Table

Two Clayton Act sections provide for private enforcement of the antitrust laws. Section 4[10] permits actions for monetary relief, whereas Section 16[11] provides for injunctive relief. As treble damage actions are far more important, they are the focus of this Article and so it is useful to begin with an examination of the statutory language permitting these actions: ". . . [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . , and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."[12]

A cursory analysis of this provision would suggest that the successful antitrust plaintiff must prove three elements to sustain a claim for treble damages: (1) that the defendant violated one or more of the antitrust laws; (2) that the plaintiff suffered some discernible injury to its "business or property" from that violation; and (3) that there was some causal link between the violation and the injury. However, the courts have identified at least two other necessary elements for a successful private action. First, not all forms of injury to the plaintiff's business or property qualify for redress. Rather, only those forms of harm which fall into the category of *antitrust injury* are deemed compensable.[13] Second, only certain plaintiffs are within the protected group, as numerous potential plaintiffs, whose injury is more indirect or who are not within the "target" of the defendant's unlawful conduct, are deemed to lack the requisite *standing* to bring the action.[14]

I am the co-author of one of the leading treatise series on the federal antitrust laws.[15] Three years ago, I completed a volume in that series which deals with private enforcement, including questions of standing and antitrust injury.[16] During my research and writing, I was struck by the growing number of cases which dismissed treble damage actions without even reaching the merits of the claim, but rather for the perceived failure to satisfy these elements of a Clayton Section 4 action.[17] At that time, a student asked for a

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10. Clayton Act, ch. 323, § 4, 38 Stat. 730, 731 (1914) (current version at 15 U.S.C. § 15).

11. Clayton Act § 16, 38 Stat. 730, 737, 15 U.S.C. § 26.

12. Clayton Act § 4.

13. *See infra* notes 23-25 and accompanying text.

14. *See infra* notes 26-28 and accompanying text.

15. EARL W. KINTNER & JOSEPH P. BAUER, FEDERAL ANTITRUST LAW (11 vols.) (1980-1998).

16. 11 JOSEPH P. BAUER, FEDERAL ANTITRUST LAW (1998).

17. A brief observation on linguistic precision: Many decisions refer unclearly to an action asserting a violation of Clayton Section 4. However, although this provision creates private remedies for monetary relief, it does not define the unlawful conduct. That is found elsewhere, in Section 1 and Section 2 of the

potential topic for a directed reading in the antitrust field. I suggested that she look at this area, with a particular focus on three recent court of appeals decisions,[18] which I thought took an unduly harsh approach to private enforcement.[19] Two of these cases and a few others will be discussed in this Article. As much as selected decisions can serve as anecdotes, they reflect this unfortunate hostility to private enforcement specifically and to the antitrust laws in general.

In this Article, I will offer some thoughts on this topic. First, as just noted, there is significant evidence of judicial inhospitality to private enforcement. Second, this under-examined aspect of the judicial assault on antitrust poses a far greater threat to the maintenance of competitive markets and the prevention of anti-competitive practices than are presented by those decisions on the merits which have altered the substantive requirements of the antitrust laws.[20] Additional scholarly attention to, and criticism of, this trend is necessary.[21]

Sherman Act, and in Section 2, Section 3 and Section 7 of the Clayton Act. Clayton Section 4 then incorporates those other provisions by its reference to "anything forbidden in the antitrust laws." 38 Stat. at 731.

18. George Haug Co. v. Rolls Royce Motor Cars, Inc., 148 F.3d 136 (2d Cir. 1998); City of Pittsburgh v. W. Penn Power Co., 147 F.3d 256 (3d Cir. 1998); Campos v. Ticketmaster Corp., 140 F.3d 1166 (8th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999).

19. The student's paper that criticized those cases was subsequently published as a note. *See* Heather K. McShain, Note, *Still Alive: Antitrust Injury Remains A Part of the Standing Inquiry Under Sections 4 and 16 of the Clayton Act Despite Three Recent Appellate Court Decisions*, 75 NOTRE DAME L. REV. 761 (1999).

20. *See, e.g.*, Cal. Dental Ass'n v. FTC, 526 U.S. 756, 779-81 (1999) (rejecting court of appeals' conclusion that FTC had properly found that professional association's rules, which prohibited certain forms of advertising, were violative of Section 5 of FTC Act under the "quick look" rule of reason approach, and instead requiring more extensive rule of reason analysis); State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) (holding that maximum resale price maintenance is governed by a rule of reason rather than a per se standard) (overruling Albrecht v. Herald Co., 390 U.S. 145 (1968)); Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459 (1993) (clarifying that dangerous probability of success is an essential element of attempt to monopolize claim under Sherman § 2); Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 57 (1977) (holding that vertical nonprice restraints are to be evaluated under rule of reason rather than condemned as per se unlawful) (overruling United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967)).

21. Over the past decade, there have only been a handful of law journal articles concerning general antitrust injury and standing questions. *See, e.g.*, Maxwell M. Blecher & James Robert Noblin, *The Confluence of Muddied Waters: Antitrust Consequential Damages and the Interplay of Proximate Cause, Antitrust Injury, Standing and Disaggregation*, 13 ST. JOHN'S J. LEGAL COMMENT. 145 (1998); Joseph Brodley, *Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals*, 94 MICH. L. REV. 1 (1995); C. Douglas Floyd, *Antitrust Victims Without Antitrust Remedies: The Narrowing of Standing in Private Antitrust Actions*, 82 MINN. L. REV. 1 (1997); Norman W. Hawker, *The New Antitrust Paradox: Antitrust Injury*, 44 RUTGERS L. REV. 101 (1991); Jonathan M. Jacobson & Tracy Greer, *Twenty-One Years of Antitrust Injury: Down the Alley with* Brunswick v. Pueblo

The U.S. Supreme Court has considered antitrust injury and standing on a number of occasions.[22] The requirement of showing *antitrust injury*[23] exists because although certain activities or structural changes may injure competition in some markets, and thus may be unlawful because of that effect, that same behavior may yield benign or even pro-competitive results in other markets. Furthermore, a core principle of antitrust is that it is designed to protect competition, and not to protect individual competitors from the effects of competition. Therefore, an antitrust plaintiff seeking treble damages can show the requisite antitrust injury only when the harm it suffered is the result of a *reduction* in competition.[24] As indicated by the Supreme Court, this requirement is designed to "ensure[] that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place, and it prevents losses that stem from [increases in] competition

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Bowl-O-Mat, 66 ANTITRUST L.J. 273 (1998); McShain, *supra* note 19; William H. Page & John Lopatka, *Antitrust Injury, Merger Policy, and the Competitor Plaintiff*, 82 IOWA L. REV. 127 (1996) (criticizing Professor Brodley's article). *See also* William H. Page, *The Scope of Liability for Antitrust Violators*, 37 STAN. L. REV. 1445 (1985) (proposing that economic approach, focusing on optimal deterrence, be used to formulate rules for antitrust injury and standing). One variant of this question, the prohibition on suits by "indirect purchasers," otherwise known as the *Illinois Brick* rule, *see infra* notes 31-34 and accompanying text, has received slightly more recent attention in the secondary literature. *See, e.g.*, Roger D. Blair & Jeffrey L. Harrison, *Reexamining the Role of* Illinois Brick *in Modern Antitrust Standing Analysis*, 68 GEO. WASH. L. REV. 1 (1999); Chris Coutroulis & D. Matthew Allen, *The Pass-On Problem in Indirect Purchaser Class Litigation*, 44 ANTITRUST BULL. 179 (1999); Herbert Hovenkamp, *The Indirect-Purchaser Rule and Cost-Plus Sales*, 103 HARV. L. REV. 1717 (1990); Michael S. Jacobs, *Lessons from the Pharmaceutical Antitrust Litigation: Indirect Purchasers, Antitrust Standing, and Antitrust Federalism*, 42 ST. LOUIS U. L.J. 59 (1998); William H. Page, *The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of* Illinois Brick, 67 ANTITRUST L.J. 1 (1999).

22. The Supreme Court has examined antitrust injury on seven occasions, finding the requirement unsatisfied in six of those decisions. *See* Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990) (finding an absence of antitrust injury) (discussed *infra* notes 61-74 and accompanying text); Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104 (1986) (same); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (same); Associated Gen'l Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519 (1983) (same); Blue Shield of Va. v. McCready, 457 U.S. 465 (1982) (finding antitrust injury); J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557 (1981) (finding absence of antitrust injury); and Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) (same). The Court's consideration of antitrust standing has been limited to two occasions, and they have split one to one *Associated General* (finding absence of standing) and *Blue Shield* (holding standing requirement was satisfied).

23. Antitrust injury is discussed in detail in BAUER, *supra* note 16, at § 78.6.

24. "Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short be 'the type of loss that the claimed violations . . . would be likely to cause.'" *Brunswick*, 429 U.S. at 489 (quoting Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 125 (1969)) (emphasis added).

from supporting suits by private plaintiffs for either damages or equitable relief."[25]

Various formulations have been used to identify those plaintiffs who have *standing* to assert an antitrust claim:[26] persons whose injury has been "direct," whose harm was "foreseeable," who were within the "target area" of the defendant's conduct, who were within the "zone of interest" protectable by the antitrust rule in question, and so forth.[27] However, all of these "tests" should be recognized as constituting different means of limiting the universe of would-be claimants, by identifying the better (or best) claimants,[28] and then eliminating other potential plaintiffs who present the risk of duplicative recovery, or for whom the fact or amount of damages may prove unduly speculative, or where problems of proof may be particularly complex. Having said this, it is clear that these rules bar claims by certain parties who have in fact suffered antitrust injury, because there may be other parties whose injury is perceived to be more worthy of protection.

In *Associated General Contractors*,[29] the Supreme Court stated that determining antitrust standing required an evaluation of "the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them."[30] The Court proceeded to identify a number of factors to consider to determine whether the particular plaintiff had the requisite standing.[31] These factors include the existence of a causal connection between the antitrust violation and the harm to the plaintiff; the defendant's intent to cause that harm; the nature of the plaintiff's alleged injury;[32] the directness or indirectness of the asserted injury; the existence of an identifiable class of other persons who would be motivated to bring their own antitrust actions for

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25. *Atl. Richfield*, 495 U.S. at 342.

26. Standing is discussed in detail in BAUER, *supra* note 16, at § 78.7.

27. *See* McCarthy v. Recordex Serv., Inc., 80 F.3d 842, 850 n.13 (3d Cir.) (describing various "tests"), *cert. denied*, 519 U.S. 825 (1996).

28. Drawing on economic analysis, this is sometimes described as a search for a party which will be an "efficient enforcer" of the antitrust laws. *See, e.g.*, Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1449-50 (11th Cir. 1991).

29. Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519 (1983).

30. *Id.* at 535.

31. *Id.* at 537-45. The Court emphasized that it would be "virtually impossible to announce a black-letter rule that will dictate the result in every case," *id.* at 536, and that instead it would "identify factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances." *Id.* at 536-37.

32. Standing is far more likely to be found when the plaintiff is either a consumer or a competitor in the market in which trade was restrained. *Id.* at 539.

the asserted violation; the extent to which the damages claimed are speculative or would require complex computation; and the potential for duplicative recovery.[33]

An important sub-species of the standing requirement is the judicially created rule that bars "indirect purchasers" from asserting an antitrust claim. This doctrine, which was announced in the Supreme Court's 1977 *Illinois Brick*[34] decision, only permits a "direct purchaser" from the defendant to pursue a claim for treble damages.[35] Although *Illinois Brick* was intended in part to accommodate the earlier rule first advanced in *Hanover Shoe*,[36] that the defendant could not defend against an action by a direct purchaser by asserting that the customer had in turn passed on the higher costs to its own customers, the net effect of these two decisions has been to bar actions by the parties who not only are most frequently actually injured by the antitrust violations, but also by those parties who often are most likely to wish to assert a claim.[37]

These doctrines, and many of the cases interpreting them, are grounded on a sound public policy, of placing prudential limits both on the number of private antitrust claims and the persons who may bring them. Taken in the aggregate, however, the Supreme Court cases,[38] and even more troubling, many subsequent lower court decisions, also evidence a hostility to the antitrust laws which makes it far more difficult to protect markets against anti-competitive practices.

Speaking in economic terms, the question is what rules will give us "optimal" enforcement and deterrence? What rules will yield the best combination of governmental and private enforcement—of deterring, ex ante, and challenging, ex post, undesirable conduct or undesirable structural changes, while leaving alone that which is procompetitive or benign? I believe that the doctrines that have been formulated are unduly restrictive and therefore yield sub-optimal enforcement. At the end of this Article, I will

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33. *Id.* at 537-45.

34. Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977).

35. The *Illinois Brick* rule is discussed in detail in BAUER, *supra* note 16, at § 78.8.

36. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968).

37. The Court has treated the *Illinois Brick* rule on two subsequent occasions. In *Kansas v. Utilcorp United, Inc.*, 497 U.S. 199 (1990), the Court rejected an electric utility's attempt to carve out exceptions to the doctrine and held that it also applied to *parens patriae* proceedings. In *California v. ARC America Corp.*, 490 U.S. 93 (1989), the Court held that *Illinois Brick* did not foreclose actions by indirect purchasers suing under *state* antitrust laws.

38. As noted above, six of the seven Supreme Court decisions dealing with antitrust injury have found it lacking in the case at bar, and of the two Supreme Court decisions dealing with standing, the plaintiff was unsuccessful in the more recent decision. *See supra* note 22.

offer a few changes to the present rules, as steps to restore the proper role of the private sector in enforcing the antitrust laws.

Among my "favorites" in the "parade of horribles" of cases demonstrating hostility to private enforcement of the antitrust laws are two of the decisions I mentioned earlier, as the subjects of examination by my former student who was undertaking a directed reading.[39] One of these is from the Third Circuit, the other from the Eighth Circuit.

In the early 1990's, two utility companies, Allegheny Power System, Inc. and Duquesne Light Co.,[40] provided electric power in different portions of the Pittsburgh metropolitan area. Pursuant to state statutes and regulations in force at the time, electric utilities had exclusive rights in a territory unless another utility could show to the Pennsylvania Public Utility Commission (PUC) that the certificated utility provided inadequate service to customers.[41] The City of Pittsburgh embarked on plans to redevelop several urban areas, which were served exclusively by Duquesne. Because the state legislature had recently enacted legislation paving the way for competition in the provision of electric power and Allegheny's rate structure was significantly lower than Duquesne's, the City filed a petition with the PUC to authorize Allegheny to provide electric service in the redevelopment areas. Allegheny intervened before the PUC in support of that application.[42]

Then, lo and behold, Allegheny and Duquesne entered into a contract to merge. Shortly thereafter, Allegheny withdrew its application to serve as an additional provider of electricity. In *City of Pittsburgh v. West Penn Power Co.*, the City challenged both the pre-merger agreement, alleging that it violated Section 1 of the Sherman Act, and the merger itself, alleging that it violated Section 7 of the Clayton Act.[43] The City sought both injunctive relief and treble damages, asserting that the agreement and the merger resulted in the elimination of actual or potential competition for the sale of electricity and consequent higher rates.[44] Affirming the district court's dismissal of the City's lawsuit,[45] the Third Circuit collapsed the antitrust injury and standing questions, and focused on whether there was a causal connection between the violation alleged and the city's injury.[46] Finding an absence of the requisite

39. *See supra* notes 18-19 and accompanying text.
40. City of Pittsburgh v. W. Penn Power Co., 147 F.3d 256, 260 (3d Cir. 1998).
41. *Id.*
42. *Id.*
43. *Id.* at 262.
44. *Id.*
45. City of Pittsburgh v. W. Penn Power Co., 993 F. Supp. 332 (W.D. Pa. 1998).
46. The court noted that antitrust injury was a necessary, but not sufficient, condition of standing,

causation, the court stressed that competition did not exist between Allegheny and Duquesne at the time of the challenged agreement, that it was uncertain whether the PUC would have granted Allegheny's application, and that therefore one could only speculate whether actual competition had been foreclosed.[47] Rather, the court of appeals asserted that the City's inability to choose between two suppliers of electricity was the result of the regulated nature of the utility industry.[48]

I believe that the court's cramped approach to antitrust injury was at least in part a reflection of its desire to cut down on antitrust litigation.[49] However, it also reflects scepticism of the importance of the role played by the antitrust laws. Prior to the agreement, not only was the City desirous of competition for the sale of electricity, and the benefits to consumers that would flow from it, but Allegheny was desirous of providing that competition.[50] It is true that one does not know for sure that the PUC would have granted the application, although the recent state legislation evidenced a legislative goal of fostering competition between electric utilities.[51] Thus, it was not unlikely that the PUC would have granted a certificate to Allegheny. But, one can say for sure that the challenged agreement absolutely foreclosed the possibility of competition or the lower rates to electricity consumers that Allegheny was prepared to offer.[52] By denying standing to the City of Pittsburgh to mount an antitrust

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and that if the former requirement was not satisfied, there was no need further to examine the latter. *W. Penn Power Co.*, 147 F.3d at 265.

47. *Id.* at 268.

48. *Id.* at 269.

49. The Third Circuit described its inquiry as one of trying to strike "a balance . . . between encouraging private actions and deterring legitimate competitive activity through overly vigorous enforcement." *Id.* at 264. In light of the court's explicit recognition that the City had alleged harm to competition, *id.* at 263, it is hard to tell what "legitimate competitive activity" might have been deterred by permitting the city to maintain its challenge to Allegheny's withdrawal of its application to be permitted to compete with Duquesne.

My concern that the Supreme Court's recent jurisprudence has encouraged a restrictive attitude towards private enforcement by the lower courts is exemplified by the Third Circuit's description of the *Associated General* decision: "Its approach to the standing inquiry has been interpreted as requiring a narrowing view, as opposed to the broad remedial purpose approach of cases that preceded it." *Id.* at 264.

50. *Id.* at 261.

51. *Id.* at 260.

52. One of the court's bizarre observations, in rejecting the City's Sherman Section 1 claim, was that Allegheny "never did compete, and therefore, any injury to the City did not result from a lessening of competition." *Id.* at 266. Apparently the court thought that the only competition protected by the Sherman Act was *actual*, or *present*, competition, for it appeared deaf to the City's claim that the removal of the *potential*, or *future*, competition that Allegheny proposed to offer to Duquesne, and which the agreement foreclosed, was actionable.

In the subsequent portion of the opinion, rejecting the City's Clayton Section 7 claim, the court

attack on that conduct,[53] the court made the agreement and the subsequent merger immune from judicial scrutiny. Needless to say, that result is antithetical to the goals of the antitrust laws.

The Eighth Circuit's decision in a challenge by individuals and a proposed class of popular music fans to certain practices by Ticketmaster is equally outrageous.[54] By virtue of long-term exclusive contracts that Ticketmaster has with almost every promoter of popular music concerts in the United States, it is a monopoly supplier of ticket distribution or ticket delivery services to those shows.[55] These contracts in turn ensure that Ticketmaster will have the right to handle the vast majority of ticket sales for almost every large-scale concert, regardless of whether it has an exclusive contract with the particular venue where the concert is being held.[56] The plaintiffs alleged that this control allowed Ticketmaster to extract supracompetitive fees for its ticket distribution services.

The Eighth Circuit relied on the *Illinois Brick* rule to affirm the district court's dismissal of the complaint. As noted above,[57] that doctrine bars actions by "indirect purchasers," harmonizing the Supreme Court's earlier *Hanover Shoe* decision, which precludes an assertion by the defendant, in a suit brought by the original, or direct, purchaser, that the overcharge had been "passed on" by the plaintiff to its own customers.[58] Thus, in the *Illinois Brick* case itself, the State of Illinois and some county and municipal plaintiffs, which had made numerous contracts for the construction of facilities in which brick was one component, were barred from seeking treble damages from the brick manufacturers, who had sold those bricks to contractors or subcontractors. It was only those direct purchasers who could maintain an action for the overcharge.[59]

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recognized that Section 16 of the Clayton Act permits the grant of injunctive relief if the plaintiff shows "threatened loss" or damage. *Id.* at 268. But here, the court established a virtually insurmountable evidentiary barrier for the plaintiff by noting that because it was not certain that the PUC would have granted the application for Allegheny to provide service in the redevelopment area, "the City will never be able to prove a direct link between the alleged antitrust violation and their [sic] purported injury." *Id.*

53. Here, the court could not rely on one of the explanations for denying antitrust standing, that someone else, waiting in the wings, was likely to mount a challenge and would be a "better" plaintiff.

54. Campos v. Ticketmaster Corp., 140 F.3d 1166 (8th Cir. 1998), *cert. denied*, 119 S. Ct. 865 (1999).

55. *Id.* at 1168.

56. Because the case was dismissed by the district court on the pleadings, the Eighth Circuit recognized that all of the plaintiffs' allegations had to be taken as true. *Id.* at 1168.

57. See *supra* notes 34-37 and accompanying text.

58. Illinois Brick v. Illinois, 431 U.S. 720, 728 (1977).

59. *Id.* at 745-46.

These two Supreme Court decisions, and numerous subsequent cases, make clear that the *Illinois Brick* rule bars claims by parties further down the vertical distribution chain from the original purchaser. Under that principle, it should be clear that these plaintiffs should not have been barred from asserting a claim, as they were dealing directly with Ticketmaster, buying both the tickets and the distribution services directly from them. Instead, the Eighth Circuit created a new, and bizarre, definition of "indirect purchaser": a person "who bears some portion of a monopoly overcharge only by virtue of an antecedent transaction between the monopolist and another, independent purchaser."[60] Although it is true that there was some prior relationship between the concert venues and Ticketmaster, this was clearly not a situation where Ticketmaster had created a product and then sold it at an elevated price to its "direct purchaser," which in turn sold it to the indirect buying plaintiffs. Here, the plaintiffs dealt directly with the defendant, and paid the overcharge directly to it. If anything, Ticketmaster was acting as an agent for the venues, in their sales of tickets to the concert-goers. Furthermore, permitting this suit to proceed would not have implicated the goal at the heart of *Illinois Brick*, preventing duplicative suits by both direct and indirect purchasers. Here, as the venues did not purchase these services from Ticketmaster, they would have had no basis for asserting a claim for any overcharge. The consequence of the Eighth Circuit's holding was that the only private parties who had any incentive to bring a lawsuit, and any basis for asserting that they were harmed, were barred from bringing a treble damage action.

In short, this case epitomizes the ultimate, four-step recipe for abuse of antitrust standing requirements. Start with a bad rule (here, *Illinois Brick*). Extend that rule in aberrational ways. Ignore the policies that animated the establishment of the rule. Finally, misapply the basic rule to the facts. Without even stirring or baking, the Eighth Circuit's use of this recipe resulted in the undermining of the goals of the antitrust laws, including, in particular, the promotion of competition to protect consumer interests.

Although its decisions have not been as outrageous, the Supreme Court is not immune to criticism regarding its erecting unduly high barriers to demonstrating antitrust injury and standing. One of the more troubling cases is its most recent decision in this area, *Atlantic Richfield Co. v. USA Petroleum Co.*,[61] in which the Court held that a retail dealer's loss of profits

60. *Campos*, 140 F.3d at 1169.

61. Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990).

resulting from its competitor's implementation of a non-predatory, maximum vertical resale price program did not constitute "antitrust injury."[62]

The defendant was a vertically integrated oil company, selling gasoline both through its own stations and through independent dealers. The plaintiff was an independent marketer of gasoline, competing with the defendant at the retail level. To increase its market share, the defendant offered discounts to its dealers, but then required them to adhere to maximum retail prices.[63]

In an opinion by Justice Brennan, the Court concluded that even if the defendant's conduct was unlawful, the plaintiff had not suffered antitrust injury.[64] Although the plaintiff may have lost business and profits because the defendant's program placed a ceiling on the prices charged by the plaintiff's competitors, its injury only flowed from their *lower*—but not predatorily low—prices. Such rivalry on pricing is the essence of competition.[65] As antitrust injury encompasses only that harm which flows from that which makes the defendant's acts unlawful,[66] and as a reduction in prices could hardly have been the justification for creating a rule making maximum resale price maintenance illegal, the Court held that it would be improper to allow a plaintiff to seek treble damages for that kind of harm.[67]

Justice Stevens' dissent[68] identified at least two flaws in the Court's analysis.[69] It is true that low prices are beneficial to consumers, at least in the short run. However, even if the defendant's and its customers' sustained low prices were not predatory, they still could have driven the plaintiff out of business, thereby harming competition and consumers in the long run.[70] And, if the conduct truly violated the antitrust laws, then it was important to encourage lawsuits by a wider range of plaintiffs, as much to deter wrongdoers as to compensate injured parties.[71]

I suspect that the majority's determination that the plaintiff had not sustained antitrust injury was based at least in part on uncertainty about the

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62. *Id.* at 331.
63. *Id.* at 331-32.
64. *Atl. Richfield*, 495 U.S. at 346.
65. *Id.* at 345.
66. *See supra* note 24.
67. *Atl. Richfield*, 495 U.S. at 331.
68. *Id.* at 346 (Stevens, J., dissenting). Justice White joined in this dissent.
69. *Id.* at 346-47.
70. "[N]otwithstanding any temporary benefit to consumers, the unlawful pricing practice that is harmful in the long run to competition causes 'antitrust injury' for which a competitor may seek damages." *Id.* at 351 (Stevens, J., dissenting).
71. *Id.* at 360.

merits of the claim. While maximum resale price maintenance was unlawful per se at the time of this decision,[72] that rule was under strong attack in the antitrust literature. In *Atlantic Richfield*, the Court gave what was at best lukewarm endorsement to the rule,[73] and in fact, overruled it only seven years later.[74] Here, rather than confronting the substance of the violation, the Court unwisely relied solely on principles of antitrust injury to deny recovery to the injured competitor. In doing so, the Court failed to take full account of the beneficial role played by private enforcers of the antitrust laws.

A discussion of a few other recent lower court decisions will conclude this brief review of obstacles placed in the way of private plaintiffs seeking treble damage recovery. One large collection of cases involves claims against tobacco companies, asserting various kinds of antitrust conspiracies, including withholding information or stifling product development, which resulted in increased expenditures by various entities paying for smokers' health care costs. The majority of these actions involved actions by union trust funds or multi-employer health benefit plans, which had to pay the elevated expenses of their insureds or of covered employees.[75] Similar theories were asserted in actions brought by two groups of hospitals that provided care to smokers, but which were then not reimbursed by their nonpaying patients.[76] In virtually all of these cases, the courts have dismissed the claims, concluding that the plaintiffs lacked standing.[77]

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72. Albrecht v. Herald Co., 390 U.S. 145, 153 (1968).

73. "We assume, arguendo, that *Albrecht* correctly held that vertical, maximum price fixing is subject to the per se rule." *Atl. Richfield*, 495 U.S. at 335 n.5.

74. State Oil Co. v. Khan, 522 U.S. 3, 18 (1997).

75. *See, e.g.*, Lyons v. Philip Morris, Inc., 225 F.3d 909 (8th Cir. 2000); Tex. Carpenters Health Benefit Fund v. Philip Morris, Inc., 199 F.3d 788 (5th Cir. 2000); Int'l Bhd. of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris, Inc., 196 F.3d 818 (7th Cir. 1999); Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc., 191 F.3d 229 (2d Cir. 1999), *cert. denied*, 528 U.S. 1080 (2000); Or. Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc., 185 F.3d 957 (9th Cir. 1999), *cert. denied*, 528 U.S. 1075 (2000); Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912 (3d Cir. 1999), *cert. denied*, 528 U.S. 1105 (2000); R.I. Laborers' Health & Welfare Fund v. Philip Morris, Inc., 99 F. Supp. 2d 174 (D.R.I. 2000). *See generally* Stasia Mosesso, Note, *Up In Smoke: How the Proximate Cause Battle Extinguished The Tobacco War*, 76 NOTRE DAME L. REV. 257 (2000).

76. Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc., 241 F.3d 696 (9th Cir. 2001); Allegheny Gen. Hosp. v. Philip Morris, Inc., 228 F.3d 429 (3d Cir. 2000).

77. Plaintiffs have been only marginally more successful with their antitrust claims in a handful of district court cases. In *Serv. Employees Int'l Union Health & Welfare Fund v. Philip Morris, Inc.*, 83 F. Supp. 2d 70 (D.D.C. 1999), the court held that the plaintiffs had standing to proceed with a Sherman Act claim, but then dismissed it both for a failure to show antitrust injury and on the merits. In *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc.*, 36 F. Supp. 2d 560 (E.D.N.Y. 1999), *as amended sub nom. National Asbestos Workers Medical Fund v. Philip Morris, Inc.*, 74 F. Supp. 2d 221 (E.D.N.Y. 1999), the court held that plaintiffs had standing to proceed with claims under the Racketeer Influenced and Corrupt

Although these decisions have recognized the harm suffered by the plaintiffs, and in several cases have even noted that the defendants' conduct was both intentional and the proximate cause of the plaintiffs' injuries, these courts nonetheless have refused to allow these claims to proceed. Perhaps paralyzed by the scope of potential litigation and the consequent burden on the judicial system, the decisions have focused on two factors mentioned in *Associated General Contractors*,[78] the extent to which the damages claims are speculative and the likelihood that they would require complex calculation, as sufficient to justify dismissal of these claims.

One can justifiably lament the potential imposition on the resources of the federal judiciary from litigation of these claims, or could say that these issues are better resolved legislatively. But, given the courts' recognition that the plaintiffs were directly harmed by the tobacco companies' alleged antitrust violations, it is even more lamentable that these enforcement doctrines were used to cut off these claims, before courts ever reached the merits.

Another troubling recent case is the Ninth Circuit's decision in *Lucas Automotive Engineering, Inc. v. Bridgestone/Firestone, Inc.*[79] The plaintiff, Lucas, and the defendant, Coker, were distributors and suppliers of original equipment major brand vintage tires.[80] Coker, by far the larger company, had been the exclusive distributor of all major brands except Firestone, for which Lucas also had had distributional rights, and Goodyear, which accounted for only ten percent of this market, and which was distributed by an unrelated third company.[81] Coker then entered into a contract with Firestone to acquire its vintage tire molds and worldwide distribution rights, the result of which was to foreclose Lucas' ability to purchase Firestone tires from sources other than Coker or Coker's distributors.[82]

Lucas brought a lawsuit challenging the transaction under Section 2 of the Sherman Act and Section 7 of the Clayton Act.[83] It asserted antitrust injury and standing both as a competitor and customer of Coker.[84] In affirming the district court's dismissal of Lucas' claim for treble damages, the Ninth Circuit

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Organizations Act (RICO), and dismissed the antitrust claim because RICO's theory and remedies were preferable for the plaintiffs.

78. *See supra* notes 29-33 and accompanying text.

79. 140 F.3d 1228 (9th Cir. 1998).

80. *Id.* at 1230.

81. *Id.* at 1230-31.

82. *Id.* This contract gave Coker control over seventy-five percent of the vintage tire market and ninety percent of the original equipment market. *Id.*

83. *Id.* at 1231.

84. *Id.*

analogized this situation to *Brunswick*;[85] it found an absence of antitrust injury because "Lucas . . . would have suffered the same injury had a small business acquired the exclusive right to manufacture and to distribute Firestone tires."[86]

The court's conclusion failed to recognize that the plaintiff's substantive claims depended on the defendant's large market share and market power, coupled with the substantial barriers to entry into the market. The hypothetical acquisition by a smaller company would not have facilitated monopolization of that market, nor would the acquisition have violated Section 7 of the Clayton Act. And, because the overall market for vintage tires would have been significantly different (and more competitive) if the defendant were not such a dominant force in that market, the plaintiff might well have had other opportunities to continue as a tire distributor had that same contract been entered into by a smaller firm.[87] By contrast, the increased power that Lucas obtained through the contract with Firestone enhanced its ability to limit output and/or raise prices to the detriment of the consuming public.[88]

* * * * *

What conclusions can be drawn, and what suggestions can be made, by an examination of these decisions? The problem lies both with the articulated standards for antitrust injury and standing and the application of these tests to specific situations. As a beginning, I would modify the antitrust injury rule, to allow a plaintiff to assert a claim for any per se violation of the antitrust

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85. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1986). Brunswick, which was one of the two largest manufacturers of bowling equipment, acquired the assets of several insolvent bowling centers. *Id.* at 479. The plaintiffs, who were competitors of the acquired bowling centers, alleged that these acquisitions violated Section 7 of the Clayton Act. *Id.* The Supreme Court dismissed the claims, first noting that the plaintiffs' gravamen was that they were hurt by the *preservation* of competition, which would otherwise have been eliminated had the insolvent centers gone out of business, and then pointing out that the plaintiffs would have suffered the same "harm" had those centers been acquired by other entities. *Id.* at 485.

86. *Lucas*, 140 F.3d at 1233. In a divided portion of the opinion, two members of the panel, while agreeing that Lucas could not pursue its claim for treble damages, concluded that it did have standing under Section 16 of the Clayton Act, in its capacity as a customer at the distributional level, to seek injunctive relief against the acquisition. *Id.* at 1235-57.

87. The court also held that the *Illinois Brick* rule precluded standing by Lucas to assert a claim for treble damages, as a downstream purchaser of vintage tires, since it no longer bought tires from Coker, but only from one of Coker's distributors. *Id.* at 1234. The court recognized that the Supreme Court had only applied *Illinois Brick* to cases arising under Section 1 of the Sherman Act, but concluded that its reasoning should also apply to Clayton Section 7 claims. *Id.* at 1233-34. There was no recognition that Lucas was relegated to the status of an indirect purchaser from Coker because Coker refused to sell to the plaintiff.

88. *See generally* William Page, *Optimal Antitrust Penalties and Competitors' Injury*, 80 MICH. L. REV. 2151 (1990).

laws, unless the defendant could identify another person whose harm was more clearly the result of the competition-reducing aspect of the unlawful conduct, and who was actually ready to bring a treble damage action. I would modify the standing rules, to remove the present limitation on actions by a "good" plaintiff, i.e., one who did suffer identifiable harm, merely because the defendant has been able to identify "better," i.e., more directly harmed, plaintiffs. Finally, the "indirect purchaser" rule announced in *Illinois Brick* has had serious adverse effects on private enforcement and it should be reversed,[89] either by the Supreme Court or by the Congress.

I begin by reemphasizing the importance of private enforcement of the antitrust laws.[90] Furthermore, the role of the private bar has become even more important over the past two decades because of the redirected focus of governmental enforcement.[91] Therefore, I urge three steps. First, the Supreme Court has not examined antitrust injury in over a decade, and its last antitrust standing decision was almost twenty years ago.[92] Its failure to consider these issues more recently is certainly not for lack of opportunity. I would hope that the Court would relax its presently overly-restrictive antitrust injury and standing requirements hopefully along the lines suggested above. At a minimum, the Court should indicate to the lower federal courts that they have gone too far in denying private plaintiffs the opportunity to recover treble damages. Second, I express what I fear may be, in the present judicial climate, a forlorn hope, that the courts of appeals and district courts would recognize the value of private enforcement, and would alter their all-too-frequent refusal to allow such actions to proceed. Finally, I hope that more academics and practicing attorneys will address these problems, arguing for a reinvigoration of Section 4 of the Clayton Act.

89. *See supra* notes 34-37 and accompanying text.

90. *See supra* notes 7-9 and accompanying text.

91. With the exception of a handful of well-publicized cases, including actions against Microsoft, American Airlines and Mastercharge and VISA, today the bulk of governmental enforcement efforts consist of challenges to price-fixing agreements and certain horizontal mergers.

92. *See supra* note 22 and accompanying text.